STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM LEXINGTON COUNTY
Court Of General Sessions
The Honorable Walton J. McLeod, IV, Circuit Court Judge

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Appellate Case No. 2024-000490

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THE STATE, Respondent,

v.

DWIGHT ANTHONY POWELL, JR., Appellant.

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court properly allowed Codefendant's attorney to testify regarding the motivations of Codefendant's testimony where such testimony did not concern Codefendant's credibility.

II. Whether the trial court properly instructed the jury regarding burglary where the evidence in the record did not support the lesser included offense.

III. Whether reversable error occurred in allowing Officer Hugue to testify about burglaries in general, where Appellant was not prejudiced by Hugue's testimony.

## STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant Dwight Powell, Jr., for second-degree burglary and grand larceny. He proceeded to a jury trial on March 18-20, 2024, before the Honorable Walton J. McLeod. Appellant was found guilty as charged, and sentenced to concurrent eight-year terms for each offense. Appellant filed a timely notice of appeal.

## STATEMENT OF FACTS

Randall Sternenberg ("Codefendant") testified that on the night of November 7, 2020, he and Appellant attempted to steal a vehicle from the shed located near the Law Office of Tommy Thomas. (R. 75-77). Thomas, the victim, explained that he inherited the 1989 Maserati convertible from his father. (R. 38). Thomas further testified that the vehicle was valued at around $17,000. (R. 40). Peele, an electrician, noticed the building had been broken into when he arrived to install lights on the morning of November 8. (R. 21, 32). Peele testified that when he arrived at the scene, the roll up door was wide open and furniture had been moved. (R. 21-22). Peele then called Thomas and later moved the furniture back to where it was. (R. 22). Thomas reported the incident to the Irmo Police Department. (R. 33-34).

Officer Hugue was dispatched pursuant to the reported burglary. (R. 44-45). Hugue testified that he spoke with Thomas and was informed that some items were missing from the shed. (R. 46). Hugue observed signs of a cut lock. (R. 46). Hugue also saw fingerprints on the vehicle and informed the on call investigator. (R. 47-48). Hugue stated the fingerprints were on the driver's-side window. (R. 47-48). He also testified that based upon his experience burglaries were more common to occur at night rather than during the day. (R. 48).

Codefendant testified that he reported the incident on a kiosk while in jail. (R. 70). He testified that he reported that Appellant cleaned out a building full of furniture and forced him, at gunpoint, to assist in an attempt to start a red convertible Maserati. (R. 71-72, 85, 92). Codefendant testified that he hoped law enforcement would consider leniency as a result of the disclosure. (R. 72). Codefendant testified that his charges related to the current incident were dismissed. (R. 94). He also testified he had current charges related to possession of a stolen vehicle and meth. (R. 67-68). Codefendant testified that the burglary occurred at nighttime. (R.

75). Codefendant testified that Appellant picked him up and took Codefendant to get the vehicle started and then steal it. (R. 77). Codefendant noted that Appellant brought a car battery to the shed in hopes that it would allow the Maserati to start. (R. 80). He further stated that they connected the battery to the Maserati but were unable to start the vehicle. (R. 80-81). Codefendant stated at that time, they left the shed and went looking for tools. (R. 80-81). He then stated they got the necessary tools and went back to the shed. (R. 81). Codefendant further testified that they took the battery out of Tiffany's car, the Maserati began to turn over but Appellant thought it was out of gas. (R. 81-82). They then put the battery back in Tiffany's car and left. (R. 82). Codefendant stated at that time they took him home. (R. 83). He stated that it was still nighttime when he was dropped off. (R. 83).

Mears, a forensic scientist, testified about her prior experience with SLED and fingerprint analysis. (R. 144-145). Mears testified regarding the fingerprint latents that were taken from the vehicle in question. (R. 47, 51, 60, 118, 153). Mears testified that ten latents were taken from the crime scene and that two of them were found to be matches for Appellant. (R. 171). The two matches were from different fingers. (R. 171).

## STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

## ARGUMENT

### I. The trial court properly allowed Codefendant's attorney to testify regarding the motivations of Codefendant's testimony, because it did not concern Codefendant's credibility.

The trial court properly allowed Codefendant's attorney (Bradley Kirkland) to testify regarding the lack of an agreement in exchange for Appellant's testimony because it corroborated Codefendant's testimony and concerned Appellant's motivations for testifying without commenting on Codefendant's credibility. Additionally, the Solicitor's closing argument did not improperly vouch for Kirkland's testimony because the argument concerned only evidence introduced at trial.

Relevant Facts

Codefendant's attorney, Kirkland, testified about his representation of Codefendant in several different cases. (R. 101). Testimony was proffered to determine whether Kirkland's testimony would constitute improper bolstering. (R. 103). Kirkland testified that he represented Codefendant in a prior plea and the incident in question. (R. 101-102). Kirkland testified that Codefendant was also charged as a result of the incident in question. (R. 102). Kirkland stated that Codefendant pleaded guilty to an unrelated burglary and the charges related to the incident in question were dismissed. (R. 101-102). Kirkland testified that Codefendant's charges were not dismissed as a result of Codefendant's willingness to cooperate with the State in the present case. (R. 102). At the conclusion of the proffer, Appellant renewed his objection, stating the testimony would constitute bolstering. (R. 103). The court found the testimony more so confirmed the testimony of Codefendant because no testimony was offered concerning Codefendant's veracity or truthfulness. (R. 103). The court noted that neither party should elicit Kirkland's opinion on the truthfulness of Codefendant. (R. 104). Kirkland then testified, as he proffered, that Codefendant did not have a deal with the State in exchange for testimony. (R. 105-107).

Kirkland even went so far as to express concerns over whether the State would truly take Codefendant's testimony into consideration when resolving Codefendant's other unrelated charges. (R. 105-107).

In closing, the State commented the following:

> He and his attorney, you-all remember Brad Kirkland, they told you that there was no requirement for [Codefendant] to come into court and testify in this trial some three years after [Codefendant] has pled guilty. They told you that him being a State's witness was first discussed with the trial team early this year. Is that lawyer not to be believed?
> Now [Codefendant] does have two small charges pending now, but it's not his court time. It's not his day in court. And, of course, of course, [Codefendant] hopes and his lawyer hopes that maybe him testifying will put in a good word with a judge at a later time, but, again, it's not his court date. That's not for your consideration. It has nothing to do with the guilt or innocence of Dwight Powell. You're not here to judge the way the criminal justice system works or to pass any kind of judgement on plea bargains when I'm sure you don't have all of the relevant information. (R. 209).

Discussion

All relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory, or rule-based principle of law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

"The central point of the prohibition against improper bolstering is that a witness may not give an opinion for the purpose of conveying to the jury, directly or indirectly, that she believes the victim." 32 S.C. Jur. Witnesses § 63 (citing Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017)).

"[P]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52 (1984). Specifically, evidence of pending charges that help explain why a co-defendant testifies is relevant to show bias. Burney v. State, 386 So. 3d 170, 171 (Fla. Dist. Ct. App. 2022). "As a general rule, pending charges are relevant to show pro-government bias on the part of a testifying witness." 24 Fla. Jur 2d Evidence and Witnesses § 1015.

Here, the testimony offered did not concern the credibility of Codefendant. The testimony simply corroborated Codefendant's testimony and allowed the jury to understand the motivations behind Codefendant's testimony. Here, the motivation of Codefendant was squarely at issue. Appellant's closing argument went so far as to state "they didn't convict [Codefendant] his charges related to the burglary of Tommy Thomas's office were dismissed. They need you to buy his story." (R. 233). Here, Kirkland did not bolster Codefendant's testimony but rather explained the circumstances relevant to Codefendant's potential motivations. The testimony was not offered to show Codefendant was truthful and thus should be believed. Rather, the testimony was offered to corroborate Codefendant's claim regarding his current charges, which would enhance the credibility of his testimony. Such testimony was necessary to give the jury a complete understanding of Codefendant's position in order to determine what weight to give the testimony. See State v. Haugen, 243 P.3d 31, 43 (Or. 2010) ("Evidence of a witness's bias is generally admissible").

A solicitor may not vouch for the credibility of a witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Vouching" occurs where the prosecutor indicates to the jury that her argument

regarding the credibility of a witness is based on something other than the evidence admitted—i.e., that the prosecutor "knows something about the credibility of a witness that the jury does not know." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023).

On the other hand, when the solicitor bases credibility arguments on evidence within the record, or on reasonable or common-sense inferences therefrom, no improper vouching occurs. State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006); see also Busse, 439 S.C. at 109, 886 S.E.2d at 211 ("A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."). A solicitor has the right to argue to the jury regarding the weight that should be given to a witness's testimony. State v. Gibbs, 438 S.C. 542, 553, 885 S.E.2d 378, 384 (2023). In fact, "a prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer." Busse, 439 S.C. at 111, 886 S.E.2d at 212. Such comments are especially necessary when the case involves a "swearing contest" between a witness and the defendant. State v. Raffaldt, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995).

Here, the State's closing argument did not go so far as to convey to the jury that they should believe Kirkland's testimony based on the Solicitor's personal knowledge. Rather, the argument concerned evidence which was presented to the jury. As noted in Busse, such comments are expected and one of the fundamental responsibilities of an advocate. Accordingly, the solicitor did not go so far as to vouch for Kirkland's credibility as a witness. This Court should affirm.

## II. The trial court properly instructed the jury regarding burglary because the evidence in the record did not support the lesser included offense.

The trial court properly instructed the jury because no evidence in the record indicated the incident occurred in the daytime. In fact, all evidence presented tended to show that the offense occurred at night.

### Relevant Facts

At the conclusion of the State's case Appellant requested a charge for the lesser included burglary in the third-degree. (R. 193). The State argued that the only evidence produced at trial indicated the offense occurred at night. (R. 194). The State noted that Thomas and Codefendant testified that the offense occurred at night. (R. 194-195). Appellant argued that Thomas' testimony was circumstantial and that the jury could find that the offense occurred during daytime hours. (R. 195). The State also noted that Codefendant testified he was threatened and that Appellant had a gun. (R. 202). The court ultimately found that the lesser included charge was not appropriate in this instance because the nighttime element was not the only thing at play. (R. 202).

### Discussion

The purpose of a trial judge's jury instructions should be to enlighten the jury and aid it in arriving at a correct verdict. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). The evidence in a case determines the law which must be charged and every charge of the law must be reviewed in the light of the evidence. State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007).

While upon indictment for a greater offense a trial judge has the requisite jurisdiction to charge and convict a defendant of any lesser-included offense, a lesser-included offense instruction is required only when the evidence warrants such an instruction. State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140, 143 (Ct. App. 2005); State v. Coleman, 342 S.C. 172, 536 S.E.2d 387, 389 (Ct. App. 2000). "The law to be charged is determined by the evidence presented at trial." State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense. See State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278, 285 (Ct. App. 1999). The trial judge should refuse to charge the lesser-included offense when there has been no evidence tending to show the defendant may have committed solely the lesser offense. State v. Tucker, 324 S.C.155, 478 S.E.2d 260 (1996); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994); see Tyndall, 518 S.E.2d at 285 (holding "a lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty only of the lesser offense").

The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty only of the lesser offense. See State v. Funchess, 267 S.C. 427, 229 S.E.2d 331, 332 (1976) ("the presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice'"); see also State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial, and on the remaining evidence

found defendant guilty of the lesser offense of simple assault and battery, did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the defendant's guilt of assault and battery of a high and aggravated nature). "[O]ur cases consistently hold that a request to charge a lesser included offense is properly refused only when there is no evidence the defendant committed the lesser rather than the greater offense." Casey v. State, 305 S.C. 445, 47, 409 S.E.2d 391, 392 (1991).

Some states still adhere to the common law definition of nighttime as that time after sunset and before sunrise when it is so dark that a man's face cannot be identified except by artificial light or moonlight. 4A N.C. Index 4th Burglary and Unlawful Breakings § 12.

As noted by the State, there was no evidence produced at trial which showed Appellant committed the act during daytime hours as opposed to nighttime. Codefendant testified that Appellant committed the act at nighttime and also testified the offense was committed with a firearm. On the other hand, Appellant did not testify, and no evidence was introduced showing Appellant committed the offense during the daytime without a gun. Circumstantial evidence through the testimony of Thomas and Peele also tends to show the offense likely occurred at night. Because there was nothing in the record tending to show Appellant was guilty of third-degree burglary rather than first or second-degree, the court did not err in failing to instruct the jury on the lesser included charge. See State v. Gilmore, 396 S.C. 72, 76–77, 719 S.E.2d 688, 690 (Ct. App. 2011).

**III. No reversible error occurred in allowing Officer Hugue to testify about burglaries in general because of his personal knowledge, because Appellant was not prejudiced by Hugue's testimony.**

Any error in the allowance of Officer Hugue to testify that burglaries were more common at night than during the day is harmless because Appellant suffered no prejudice. The State remained tasked with proving this specific incident occurred at night and did so by through both direct and circumstantial evidence.

Relevant Facts

Officer Hugue testified that he observed the scene of the incident after being called by Mr. Thomas. (R. 46). Hugue also testified about seeing fingerprint evidence on the red convertible in question. (R. 48). Lastly, Hugue testified that burglaries more often occurred at night as opposed to during the day. (R. 48).

Discussion

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Even after an error is found, the appellate court must review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006); see State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Ultimately, if an error could not have reasonably contributed to the verdict, that

error is harmless beyond a reasonable doubt. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see Yates v. Evatt, 500 U.S. 391, 403 (1991) ("To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."), disapproved of on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991).

Here, Appellant suffered no prejudice because the common law conception of burglary centered around nighttime criminal activity. "The common-law conception of burglary was that it was primarily an offense against the security of the habitation. It was stated at an early date that a man's house is his castle and its security must not be lightly invaded. To preserve this security and this sanctity the law created safeguards and imposed severe penalties on their infringement." 13 Am. Jur.2d, Burglary, § 2. Blackstone noted "[T]he malignity of the offense does not so properly arise from its being done in the dark as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner and rendered his castle defen[s]eless." (4 William Blackstone, Commentaries 223-24). Accordingly, "at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night." State v. Brooks, 277 S.C. 111, 113, 283 S.E.2d 830, 831 (1981).

Further, courts have acknowledged that the common law definition of the nighttime element centers around the difficulty associated with identification. State v. Barnett, 437 S.E.2d 711 (N.C. Ct. App. 1993) (defining nighttime is that time after sunset and before sunrise when it is so dark that a man's face cannot be identified except by artificial light or moonlight.); State v.

Hammonds, 616 S.W.2d 890, 894 (Tenn. Crim. App. 1981); State v. Scott, 178 P.2d 182, 182 (Kan. 1947); Bowser v. State, 110 A. 854, 856 (Md. Ct. App. 1920).

Here, no prejudice occurred as a result of Hugue's testimony because it is a well known fact that the burglary itself is centered around concern for nighttime criminal activity. Considered in conjunction with the direct evidence presented at trial, any error is harmless. Hugue's comments were limited and did not specifically apply to the case at bar. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (explaining "[t]he circumstances of each individual case are to be considered" when conducting a harmless error analysis).

Additionally, Hugue's testimony contains little to no prejudice because the State remained tasked with showing Appellant committed the offense either at night or with a firearm. S.C. Code Ann. §16-11-312; See State v. Ryan, 543 N.W.2d 128, 143 (Neb. 1996), overruled by State v. Burlison, 583 N.W.2d 31 (Neb. 1998); Patterson v. New York, 432 U.S. 197 (1977) ("It must be remembered that the burden is upon the State to prove beyond a reasonable doubt each essential element of a crime and that the burden never shifts."). The State proved this burglary occurred at night by presenting direct and circumstantial evidence that the assault occurred at night. Accordingly, any prejudice associated with Hugue's testimony is limited and does not warrant reversal.

This Court should affirm.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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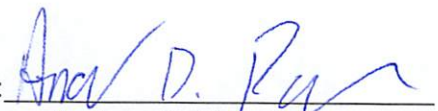
BY: 
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September 10, 2025

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**PROOF OF SERVICE**

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I, Grace Sommer, certify that I have served the within Final Brief of Respondent on Joanna K. Delany, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 10th day of September, 2025.

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